Supreme Court, U.S.
FILED
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(2)

No. 90-1602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TENNESSEE GAS PIPELINE CO.,

Petitioner,

v.

ANDERMAN/SMITH OPERATING CO.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Must a court of appeals confirm a unanimous award made by a panel of arbitrators selected pursuant to and in strict accordance with the contract between the parties, where the award draws its essence from the contract?

2. Must a court of appeals confirm a unanimous award of such an arbitration panel where (a) the parties bargained for an arbitration process to determine facts and construe disputed contractual provisions; (b) the arbitration award is rationally inferable in some logical way from the language and purpose of the contract; and (c) the award of the arbitrators addresses directly each specific issue submitted by the parties and is within the broad leeway accorded arbitrators in fashioning remedies?

3. Was the court of appeals correct in holding:

   (a) That judicial review of an arbitration award is extraordinarily narrow and the reviewing court should defer to the arbitrators' unanimous decision when possible;

   (b) That, under the very deferential standard of review, the reviewing court must sustain the arbitration award even if it does not agree with the arbitrators' interpretation of the contract; and

   (c) That the reviewing court must sustain the arbitrators' interpretation of the contract and may not invade their province where the award is rationally inferable from the language and purpose of the contract, regardless

of whether the court may have interpreted the contract differently?

4. Was the court of appeals correct in declining to make its own interpretation of the contract and, instead, upholding the opinion and reasoning of the arbitrators' award based solely on the panel's interpretation which draws its essence from the contract?

5. Must this court deny a petition for writ of certiorari for review of a court of appeal's decision affirming a district court confirmation of a unanimous arbitration award where there exists no conflict among the several circuits as to the proper standard of review in these proceedings?

LIST OF PARTIES AND RULE 29.1 LIST

The parties before the court of appeals and this court are all listed in the caption.

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No. 90-1602

TENNESSEE GAS PIPELINE CO.,

Petitioner,

v.

ANDERMAN/SMITH OPERATING CO.,

Respondent.

Brief In Opposition To
Petition For A Writ Of Certiorari
To The United States Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Anderman/Smith Operating Company (Anderman/Smith) requests this Court to deny the Petition for Writ of Certiorari filed by Tennessee Gas Pipeline Company (Tennessee) for review of the opinion and order of the United States Court of Appeals for the Fifth Circuit in *Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215 (5th Cir. 1990) (Rehearing and Rehearing *En Banc* Denied January 17, 1991).

OPINIONS BELOW

The Petition for Writ of Certiorari requests review of the Fifth Circuit's decision affirming the decision of the Mississippi District Court confirming the unanimous award of an arbitration panel selected by agreement of the parties in compliance with the arbitration provisions of a long-term natural gas contract. The pertinent opinions and orders from the arbitration panel, the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit are reprinted in the Appendices to the Petition filed by Tennessee. Respondent, Anderman/Smith, incorporates by reference each of these opinions and orders designated as Appendices A through E to the Petition.

JURISDICTION

Respondent, Anderman/Smith, adopts the jurisdictional statement made by Tennessee. Nonetheless, Anderman/Smith respectfully submits that there exists no basis for this Court's review of the lower court's decision, inasmuch as there is no conflict, as suggested by Tennessee, among the decisions of the several circuits. This Court has passed on the questions presented numerous times over the past thirty years and has established a national standard of review which is followed in every circuit of this country.

STATUTORY PROVISIONS INVOLVED

Respondent, Anderman/Smith, adopts the statement concerning statutory provisions involved made by Tennessee in its Petition.

STATEMENT OF THE CASE

The statement of the case contained in Tennessee's Petition contains matters which are outside of the record and beyond the narrowly circumscribed scope of this Court's review. In lieu of contesting each inaccuracy or omission in the statement, Anderman/Smith adopts the opinion of the Fifth Circuit as its statement of the relevant facts and procedural history concerning the dispute before the arbitrators. Pet. App. A at 2a-4a. *See also* Pet. App. B at 11a-14a.

With regard to Petitioner's statements concerning the Arbitration Award and the Fifth Circuit opinion, Respondent, Anderman/Smith, in lieu of rebutting the many inaccurate statements or omissions of Tennessee, adopts by reference the Arbitration Award and the Fifth Circuit opinion as set forth in Pet. App. E at 30a-32a and Pet. App. A at 1a-10a, respectively.

REASONS FOR DENYING THE WRIT

There are two fundamental erroneous premises underlying Petitioner's position. First, Tennessee contends that the arbitration panel "re-wrote" or "ignored" the contract provisions, thus exceeding their authority. This contention was made and rejected in both the Court of Appeals and the District Court. *See* Pet. App. A at 5a, 7a-8a; Pet. App. B at 17a-18a, 21a-25a. The second erroneous assumption — *Tennessee's assertion that the Fifth Circuit interpreted the contract itself* — is belied by the language of the Court of Appeals' opinion. *See* Pet. App. A at 3a-4a & 6a-10a.

The Fifth Circuit's decision strictly complies not only with the decisions of this Court but every other

federal court of appeals with regard to the proper role of the court in reviewing decisions of arbitrators under the *Federal Arbitration Act*. This Court has established a national policy and standard of review which has been followed by the Fifth Circuit in these proceedings; thus, the Petition does not present an issue of sufficient importance for this Court's review.

The lower court's decision, by adhering to this standard of review, will encourage arbitration as a viable alternative means of resolving disputes and should discourage parties from obdurately disregarding the award of duly appointed arbitrators and engaging in wasteful judicial challenges to conscientious and fair arbitration decisions. Contrary to Tennessee's assertions, the Fifth Circuit decision does not expand the role of reviewing courts; rather, the lower court studiously adhered to the standard of review which narrowly circumscribes the court's powers by requiring enforcement of an arbitration award so long as the arbitrators' decision draws its essence from the contract and regardless of whether the reviewing court agrees with the arbitrators' interpretation of the contract.

The Fifth Circuit's allegiance to these principles will preserve the integrity of the arbitration process by recognizing that arbitrators are not required to explain their decisions, for, as noted by this Court, to require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. The lower court, in finding that the arbitrators' interpretation draws its essence from the contract and by addressing the specific issues submitted by the parties, provides the contracting parties with their bargained-for right to have an arbitrator's construction

of the contract. Plenary review by a court on the merits would render this right meaningless and the provisions of the contract that the arbitrators' decision is to be final and binding would become a nullity.

Finally, the Fifth Circuit decision serves to admonish lower courts, in reviewing petitions such as Tennessee's, to reject a party's use of the "exceeding authority" argument as a ruse to induce the reviewing court to redetermine facts or reach legal conclusions which differ from that of the consensually appointed arbitrators. This precedent will inevitably serve to advance the underlying purpose of the strong federal policy favoring arbitration to achieve efficient, cost-effective, fair and final resolution of disputes in keeping with the flexible, informal nature of arbitration.

I. THE FIFTH CIRCUIT DECISION IS IN STRICT CONFORMITY WITH THIS COURT'S OPINION IN *STEELWORKERS*

A. The *Steelworkers* Trilogy and Its Progeny: The Standard of Review

The strong federal policy favoring the enforcement of arbitration awards which has, without exception, been adopted in every jurisdiction of this country was first articulated by this Court in the *Steelworkers* trilogy. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). *Steelworkers* established the extremely narrow scope of a reviewing court's powers concerning arbitration awards — simply put, so long as an arbitration award draws its essence from the contract,

the award is legitimate and must be enforced. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597.

Every circuit has recognized and adopted this Court's ruling in *Enterprise Wheel*:

> It is the arbitrator's construction which was bargained for; and ***so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him*** because their interpretation of the contract is different from his.

363 U.S. at 599 (emphasis added). The *Enterprise Wheel* Court reasoned that, when an arbitrator is commissioned to interpret and apply the terms of the contract, he is to bring his informed judgment to bear in order to reach a fair solution of the problem, especially when it comes to formulating remedies. In so holding, *Enterprise Wheel* established that a reviewing court must accept the findings of fact and conclusions of law of an arbitrator. *See id.* at 598-99.

In *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987), this Court acknowledged that its previous decisions in *Steelworkers* "... made clear almost 30 years ago that the courts play only a limited role when asked to review the decision of an arbitrator." 484 U.S. at 38. In *Misco*, the "essence" standard formulated in the *Steelworkers* trilogy was reiterated:

> The courts are not authorized to reconsider the merits of an award even though the parties may allege the award rests on errors of fact or on misinterpretation of the con-

> tract. . . . As long as the arbitrator's award "draws its essence from the . . . agreement," and is not merely "his own brand of industrial justice," the award is legitimate.
>
> * * * *
>
> ***But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.***

484 U.S. at 36-38 (emphasis added). There exists no conflict among the several circuits as to these fundamental principles; in fact, every appellate court in this country has adopted and applied the "essence" standard of review as first espoused in the *Steelworkers* trilogy.[1] The Fifth Circuit is no exception.

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[1] *See Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215, 1218-19 (5th Cir. 1990); *Federated Department Stores v. United Food and Commercial Workers Union, Local 1442*, 901 F.2d 1494, 1496-98 (9th Cir. 1990); *Strathmore Paper Co. v. United Paperworkers International Union, AFL-CIO*, 900 F.2d 423, 425 & n. 1 (1st Cir. 1990); *Penntech Papers, Inc. v. United Paperworkers International Union, AFL-CIO-CLC*, 896 F.2d 51, 52-53 (3rd Cir. 1990); *Federated Department Stores, Inc. v. J.V.B. Industries, Inc.*, 894 F.2d 862, 866 (6th Cir. 1990); *Crafts Precision Industries, Inc. v. Lodge No. 1836 of District 38, International Association of Machinists and Aerospace Workers*, 889 F.2d 1184, 1185-86 (1st Cir. 1989); *Carte-Blanche (Singapore) Pte, Ltd. v. Carte-Blanche International, Ltd.*, 888 F.2d 260, 265 (2nd Cir. 1989); *Franklin Electric Co. v. International Union, United Automobile Aerospace and Agricultural Implement Workers of America (UAW)*, 886 F.2d 188, 192 (8th Cir. 1989); *New York Typographical Union No. 6 v. Printers League Section of the Association of Graphic Arts*, 878 F.2d 56, 60 (2nd

See Manville Forest Products Corp. v. United Paperworkers International Union, AFL-CIO, 831 F.2d 72, 74-76 (5th Cir. 1987); *Local Union 59, International Brotherhood of Electrical Workers, AFL-CIO v. Green Corp.*, 725 F.2d 264 (5th Cir.), *cert. den.*, 469 U.S. 833 (1984); *International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC v. Ingram Mfg. Co.*, 715 F.2d 886 (5th Cir. 1983), *cert. den.*, 466 U.S. 928 (1984).

The Fifth Circuit has consistently upheld the fundamental tenet that the courts should defer to the arbitrators' decision whenever possible. *Antwine v. Prudential-Bache Securities, Inc.*, 899 F.2d 410, 413 (5th Cir. 1990). A court may not review the merits of an award. It must accept the facts found by the arbitrators and the arbitrators' interpretation of the contract and applicable law. *Manville*, 831 F.2d at 74; *Aluminum Workers International Union, AFL-CIO v. Chromalloy American Corp.*, 489 F.Supp. 536, 540 (N.D. Miss. 1980). The parties bargained for arbitrators who would determine facts and interpret the contract; there is no injustice in holding them to this bargain. *Manville*, 831 F.2d at 74, *relying on, United*

Cir. 1989); *Gonce v. Veterans Administration*, 872 F.2d 995, 998 (Fed. Cir. 1989), *cert. den.*, 110 S.Ct. 234, 107 L.Ed.2d 186 (1989); *Delta Airlines, Inc. v. Airline Pilots Association, International*, 861 F.2d 665, 669-70 (11th Cir. 1988), *reh. den.*, 867 F.2d 1431 (11th Cir. 1989); *Holcomb v. Colony Bay Coal Co.*, 852 F.2d 792, 795 (4th Cir. 1988); *Jenkins v. Prudential-Bache Securities, Inc.*, 847 F.2d 631, 634 (10th Cir. 1988); *Independent Employees' Union of Hillshire Farm Co., Inc. v. Hillshire Farm Co., Inc.*, 826 F.2d 530, 532 (7th Cir. 1987); *Northwest Airlines, Inc. v. Airline Pilots Association, International*, 808 F.2d 76, 82 & n. 28 (D.C. Cir. 1987).

Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); *Green*, 725 F.2d at 268.

Respect for the finality of arbitration awards furthers the strong federal policy of encouraging parties to settle their disputes by arbitration. *Manville*, 831 F.2d at 74; *Green*, 725 F.2d at 268; *Chromalloy*, 489 F.Supp. at 540. The Fifth Circuit has recognized that the federal bench should not undertake to review the merits of arbitration awards, but should defer to the tribunal chosen by the parties finally to settle their disputes. *Hart v. National Homes Corp.*, 668 F.2d 791, 793 (5th Cir. 1982). The rationale for this rule is that plenary review by a court of the merits would make meaningless the contract's provisions that the arbitrator's decision is final and binding, for, in reality, it would almost never be final. *Hart*, 668 F.2d 791, 793 (5th Cir. 1982). *See also Local Union 59, International Brotherhood of Electrical Workers v. Green Corp.*, 725 F.2d 264, 268 (5th Cir. 1984), *cert. den.*, 469 U.S. 833 (1984); *Office & Professional Employees Int'l Union v. Washington Metropolitan Area Transit Authority*, 724 F.2d 133, 137 (D.C. Cir. 1983) (if parties could freely re-litigate their complaints in the courts, arbitration would cease to be a method to achieve prompt resolution of conflict and would, instead, become a new layer of review and a new cause for delay).

In order to promote the federal policy, the factual and legal accuracy of an arbitrator's findings will not be reviewed. *Ingram*, 715 F.2d at 891. Where it is unclear whether the arbitrator has interpreted the contract or merely relied upon some private notion of equity, any and all reasonable doubt must be resolved in favor of the arbitrator's authority to award

a particular remedy and enforcement of the award. *Ethyl Corp. v. United Steelworkers of America*, 768 F.2d 180, 185 (7th Cir. 1985), *cert. den.*, 475 U.S. 1010 (1986). In furtherance of the basic presumption that all reasonable doubt must be resolved in favor of confirmation and enforcement of the award, arbitrators are not even required to disclose or explain the reasons underlying the award. *Antwine*, 899 F.2d at 412.

When an arbitration award has been rendered, there exist only two potential areas for consideration of factual questions by a reviewing court: (a) whether the dispute actually was arbitrable and (b) whether the award drew its "essence" from the contract. *International Association of Machinists & Aerospace Workers, District 776 v. Texas Steel Co.*, 538 F.2d 1116, 1119 (5th Cir. 1976), *cert. den.*, 429 U.S. 1095 (1977) (hereinafter *Texas Steel I*). As long as an arbitration award draws its essence from the contract, the court cannot disturb an arbitrator's interpretation of the contract. *United Food & Commercial Workers v. National Tea Co.*, 899 F.2d 386, 389 (5th Cir. 1990). Under the law uniformly applied in the Fifth Circuit, and all other circuits, "[t]he court must scrupulously avoid the invasion of the arbitration panel's sphere and the enticement of ruling on the 'intrinsic merits' of the dispute." *Texas Steel I*, 538 F.2d at 1119. The "essence" standard is to be interpreted expansively, so as to uphold the award, rather than restrictively. *Manville*, 831 F.2d at 74; *Texas Steel I*, 538 F.2d at 1121. An award draws its "essence" from the agreement, so long as it is "rationally inferable" in "some logical way" from that agreement. *Manville*, 831 F.2d at 74.

B. The Fifth Circuit Decision in *Anderman/Smith* Does Not Conflict With This Court's Opinion in *Steelworkers*

Of the numerous issues submitted by the parties for resolution by the panel, *see* Pet. App. B at 12a-13a, the Fifth Circuit noted that "[t]he primary issue before the arbitration panel was to determine what the price of the gas should be. The panel was also presented, though, with important questions concerning the relative rights of the parties to adjust the price of gas in the future." Pet. App. A at 4a. The *Anderman/Smith* Court acknowledged that the arbitrators rendered a decision and fashioned a remedy which resolved all of the issues before them and that Tennessee raised two principle objections to the award: (1) Tennessee argued that the arbitrators ignored, deleted or rewrote the provisions of the contract concerning Tennessee's right to market-out[2]; and (2) Tennessee contended that the arbitrators' decision was invalid because it fashioned a remedy which exceeded the arbitrators' authority. *See id.* at 5a. Rejecting these same arguments which Tennessee now

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[2] Tennessee's entire argument is based on the inaccurate premise that the arbitration panel "departed from" or "ignored" the text of the contract and, in essence, "rewrote" the agreement between the parties. However, the panel, in interpreting the contract to reconcile the rights of the parties under the pricing terms and related provisions, rendered an award which not only "draws it essence" from the contract, but each individual and separate paragraph of the award accurately quotes contract terms, cites to specific contract clauses and provisions, reconciles the respective rights of the parties as to "price redetermination" versus "market-out" and uses repeated references to "the contract," "the contract price," "the contract under consideration," "the remaining term of the contract," *etc.* *See* Pet. App. E at 30a-32a.

advances before this Court, the Fifth Circuit, in *Anderman/Smith*, ruled that neither of the arguments provided a basis for the reviewing court's vacation of the unanimous arbitrators' award. *Id.*

The *Anderman/Smith* Court acknowledged its extraordinarily narrow scope of review and the deference it must extend to the arbitrators' decision, even though the court may not agree with the arbitrators' interpretation of the contract, "... so long as the arbitrator's decision 'draws its essence' from the contract, ..." Pet. App. A at 5a, *citing, United Paperworkers International Union v. Misco, Inc.*, 484 U.S. at 36. Acting within the guidelines established by *Steelworkers* and its progeny, the *Anderman/Smith* Court rejected Tennessee's argument that the arbitrators "deleted" what the parties had agreed to and "added" the arbitrators' own notion of what was fair, stating:

> Tennessee's argument fails for several reasons. First, ***it is clear that the arbitrators did not delete or ignore the provision of the contract that grants Tennessee the right to market-out. Tennessee retains that right***. While the arbitrators did construe the scope of Tennessee's right more narrowly than Tennessee would construe it — Tennessee argues that the contract grants it an unlimited right to market-out in its "sole judgment" — the ***decision of the arbitrators that Tennessee's rights were not that broad is precisely the sort of issue of contract interpretation that an arbitration scheme is designed to resolve***.

Pet. App. A at 7a-8a n. 3 (emphasis added). The *Anderman/Smith* Court held that "[t]here can be no question that the arbitrators' decision in this case meets the minimal standard of review applicable to arbitration awards. The award is, in every respect, 'rationally inferable' from the letter and purpose of the parties' contract." *Id.* at 6a. *See also id.* at 8a n. 3. In summary, the *Anderman/Smith* Court reasoned that ". . . the arbitrators decided that the interpretation of the contract offered by Tennessee would render the contract 'over reaching and unenforceable'. The arbitration panel clearly acted within the scope of its authority by reading the contract to avoid a result which would impute to the contract an unconscionable bargain."[3] Pet. App. A at 7a.

Thus, in interpreting the contract to reconcile the rights of the parties under the applicable pricing and other terms, the panel found that Tennessee's harsh construction of a single clause set forth in the numerous pages of these provisions was over reaching (*i.e.*, unconscionable) and, therefore, unenforceable. The Fifth Circuit acknowledged that the panel obviously must have concluded that it was over reaching for Tennessee to be able, in its sole judgment, to elect a price below that which was competitive on its

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[3] Tennessee argues that courts have rejected arbitrators' decisions to the effect that contract provisions are "unconscionable" or "unfair." Others have recognized the power of arbitrators to declare contract provisions to be unconscionable. *See, e.g., Farkar Co. v. R. A. Hanson Disc., Ltd.*, 604 F.2d 1 (2nd Cir. 1979). In any event, this does not serve to expand the narrow limits of a court's review of an arbitration award which must be upheld so long as it draws it essence (or is rationally inferable) from the contract.

end-use markets. In line with the parties' joint request, the panel, thus, unanimously established a price which would be economic on Tennessee's end-use markets without being unfair or unreasonable to Anderman/Smith. In direct response to the issues submitted by the parties, the panel acted within its authority to interpret the contract, rejecting Tennessee's unconscionable construction of the market-out provision, to achieve a fair and reasonable result for all parties properly within the clear letter and purpose of the contract. In upholding this result, the *Anderman/Smith* Court noted:

> ***[T]he arbitration award is rationally inferable from the language and purpose of the contract, and therefore must be confirmed by this Court. Indeed, even if this Court would have interpreted the contract differently, the standard of review of arbitration awards requires it to defer to the arbitrators' interpretation of the contract.*** The parties bargained for an arbitration process which would determine facts and construe disputed contract provisions; there is no injustice in holding the parties to their bargain. (citations omitted) ***Indeed, Tennessee deliberately availed itself of the contract's arbitration provisions when it instituted the arbitration proceedings it now contests.***

Pet. App. A at 8a (emphasis added).

The *Anderman/Smith* Court also rejected Tennessee's objections to the remedy fashioned by the arbitrators. Adhering to the dictates of this Court concerning the broad leeway afforded arbitrators in

fashioning remedies, the *Anderman/Smith* Court stated:

> [T]he remedy chosen by the arbitration panel was entirely appropriate. If Tennessee's narrow interpretation of the arbitrators' powers were correct, any award rendered by the arbitrators would be virtually meaningless. No matter what the arbitration panel decided, under Tennessee's reading of the contract, either party would have the right to initiate a price adjustment immediately after the award was entered. Certainly the arbitration panel had the authority to decide that for a limited period neither party would be able to change the price set by the arbitrators, in order to protect the integrity of the arbitration procedure established by the parties.
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> * * * *
>
> As to the portion of the arbitrators' award which requires that any future price adjustments be approved by the arbitration panel, this Court finds no infirmity in the arbitrators' award. The arbitrators' resolution of the disputed contract terms requires Tennessee to demonstrate by a preponderance of the evidence that the existing price of the gas prevents Tennessee from competing in its end-use markets. Plainly, such a resolution of the dispute between the parties requires that someone pass on whether Tennessee has met its burden. That someone is not specified in the contract. It was entirely proper, and in keeping with the flexible, informal nature of

> arbitration, for the panel to resolve this problem before it arose by establishing a forum which could determine whether Tennessee had established that it was entitled to market-out.

Pet. App. A at 9a, *citing, Proodos Marine Carriers Co. v. Overseas Shipping & Logistics*, 578 F.Supp. 207, 212 (S.D. N.Y. 1984) (where a long-term contract contains a broad arbitration clause, and disputes are submitted to and resolved by an arbitration panel selected in accordance with the contract, it is proper for the panel to remain in office to resolve later disputes arising under the contract).

II. THE FIFTH CIRCUIT DECISION, UPHOLDING THE ARBITRATORS' UNANIMOUS INTERPRETATION OF THE CONTRACT, DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR ANY OTHER CIRCUIT

Tennessee refers to the Fifth Circuit's appropriate deference to the arbitrators' decision as "ignoring" the decision and insists that the Fifth Circuit would require the reviewing court to perform its own legal analysis to assess whether the result reached in arbitration was rationally inferable from the contract. Again, to the contrary, the Fifth Circuit reviewed the disputed terms of the contract considered by the arbitrators, *see* Pet. App. A at 3a-4a, in determining that the court had no justification in disturbing, or even inquiring into, the arbitrators' interpretation of the contract and findings of fact and conclusions of law. *See id.* at 8a & n. 3. All of the relevant provisions of the contract — including the provision which Tennessee contends the Fifth Circuit "unilaterally interpreted" — were the subject of the arbitrators' interpretation resulting in the award which was con-

firmed by the district court and affirmed by the court of appeals. *See* Pet. App. A at 3a-4a & 6a-10a; Pet. App. B at 13a-17a & 19a-25a.

Basically, Tennessee contends that the Fifth Circuit has announced a new rule where the reviewing court must ignore the language and reasoning of the arbitrators and interpret the contract itself! This is wholly contradictory to the actual language of the *Anderman/Smith* decision in which the Court states:

> The standard of review of an arbitration award is well settled. ***The federal courts will defer to the arbitrators' resolution of the dispute whenever possible. The Congressional policy of promoting arbitration requires that courts do not intrude unnecessarily into questions that have been settled by an arbitration process agreed to by the parties, lest the efficiency of the judicial process be lost. Thus, "[j]udicial review of arbitration awards is extremely limited*** (citation omitted); [j]udicial review of an arbitration award is extraordinarily narrow and this court should defer to the arbitrators' decision when possible."

Pet. App. A at 5a (emphasis added). Thus, Tennessee has selected isolated portions of the *Anderman/Smith* decision to, in essence, intentionally twist and misconstrue the actual holding of the court. The Fifth Circuit did *not* make its own distinct interpretation; it upheld the arbitrators' interpretation under the standards required by this Court.

A. The Holding of the *Anderman/Smith* Court Does *Not* Conflict With the Decisions of the Seventh Circuit

The United States Court of Appeals for the Seventh Circuit has acknowledged that, with regard to the narrow scope of judicial review of arbitration awards, there exists "... no essential disagreement among the circuits." *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1197 (7th Cir. 1987). In fact, the court has candidly stated the practical truth that "[t]he chances for a successful appeal of an arbitration award are not particularly good." *Chameleon Dental Products, Inc. v. Jackson*, 925 F.2d 223, 225 (7th Cir. 1991). The Seventh Circuit describes the scope of judicial review of arbitration awards as "excruciatingly narrow," *Rumbleseat Press*, 816 F.2d at 1197, and "... 'close to non-existent' if the arbitrator 'interprets' ..." the contract. *Independent Employees' Union of Hillshire Farm Co., Inc. v. Hillshire Farm Co., Inc.*, 826 F.2d 530, 532 (7th Cir. 1987). Like the Fifth Circuit, the Seventh Circuit has consistently followed *Enterprise Wheel* holding that an arbitrator's award is enforceable so long as it draws its essence from the underlying agreement. *Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis*, 849 F.2d 264, 267-68 & n. 7 (7th Cir. 1988); *Hillshire Farm*, 826 F.2d at 532; *Chicago Newspaper Publishers' Association v. Chicago Web Printing Pressmen's Union No. 7*, 821 F.2d 390, 394 (7th Cir. 1987); *Local 879, Allied Industrial Workers of America, AFL-CIO v. Chrysler Marine Corp.*, 819 F.2d 786, 788 (7th Cir. 1987); *Rumbleseat Press*, 816 F.2d at 1197; *Dreis & Krump Mfg. Co. v. International Association of Machinists & Aerospace Workers, District No. 8*, 802 F.2d 247 (7th Cir. 1986); *Yellow Cab Co. v. Democratic Union Organizing Committee, Local*

777, S.I.U.N.A., AFL-CIO, 398 F.2d 735, 737 (7th Cir. 1968), *cert. den.*, 393 U.S. 1015 (1969).

The Seventh Circuit recognizes the *Steelworkers* trilogy as formulating "... that national policy ... favoring the orderly resolution of grievances through arbitration when the parties have agreed contractually to be bound by the arbitrators' determination. ..." *Amoco Oil Co. v. Oil, Chemical and Atomic Workers International Union, Local 7-1, Inc.*, 548 F.2d 1288, 1293 (7th Cir. 1977), *cert. den.*, 431 U.S. 905 (1977). The *Amoco* Court restated two basic admonitions to reviewing courts dealing with claims that arbitrators "exceeded their authority." First, as noted in *Amoco*, the fact that an arbitrator's opinion is susceptible to varying interpretations is of no moment in the determination of the validity of the accompanying award. 548 F.2d at 1294. Secondly, the Seventh Circuit recognized that "... the Fifth Circuit has cautioned against the use of the 'authority' argument as a ruse to induce the reviewing court to 'redetermine the facts — even just a tiny bit — or reach a legal conclusion on them as found or hoped for which differs from that of the consensually annointed [sic] judge.' " *Id.* at 1295.

Clearly, the Seventh Circuit is perfectly aligned with the Fifth Circuit's adoption and application of the fundamental principles espoused by this Court in *Steelworkers*. Nonetheless, Tennessee attempts to create a conflict between the circuits by referring only to two cases dealing with a remand to the original arbitration panel where there exists some error, ambiguity or need for clarification. Both *Randall v. Lodge No. 176, IAM*, 648 F.2d 462 (7th Cir. 1981), and *Young Radiator Co. v. International Union, United Auto*

Workers, 734 F.2d 321 (7th Cir. 1984), deal with instances where an ambiguity needed to be clarified or the arbitrators failed to rule on a submitted issue. Remand under such circumstances is totally consistent with the Fifth Circuit authorities which have long recognized that it is the normal course of action for a matter to be resubmitted to the original arbitration panel for clarification of an ambiguity in the award or when issues submitted were not fully resolved. *See Oil, Chemical & Atomic Workers International Union v. Rohm & Haas, Texas, Inc.*, 677 F.2d 492, 495 (5th Cir. 1982); *San Antonio Newspaper Guild Local No. 25 v. San Antonio Light Division*, 481 F.2d 821, 824-25 (5th Cir. 1973). *See also American Federation of State, County and Municipal Employees, Local Lodge No. 1803 v. Walker County Medical Center, Inc.*, 715 F.2d 1517 (11th Cir. 1983).

Ironically, the *Randall* and *Young* decisions support the proposition that there exists no split between the circuits. Both cases recognize the extremely narrow scope of the court's power limiting its review of an arbitration award to a determination of whether the award draws its essence from the contract as required by *Enterprise Wheel*. *See Young*, 734 F.2d at 323-24; *Randall*, 648 F.2d at 465-66. These fundamental concepts are precisely the principles which guided the *Anderman/Smith* Court to affirm the district court's confirmation of the unanimous arbitration award.[4] In

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[4] Interestingly, the Seventh Circuit has expressly limited its decision in *Randall*. In *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191 (7th Cir. 1987), the court reviewed the decision in *Randall* to reconcile that decision with the Seventh Circuit's basic acknowledgement that "[t]he fact that arbitrators are not required to give reasons for their awards, and

essence, Tennessee has, through some flight of fancy, concocted an illogical and unsupported argument that the Fifth Circuit, in *Anderman/Smith*, created a rule advocating that a reviewing court should disregard the arbitrators' award and conduct its own analysis of the contract. To the contrary, the *Anderman/Smith* Court, consistent with this Court's rulings and the decisions of all other circuits, left the task of interpreting the contract to the arbitrators and declined to upset the arbitrators' award which drew its essence from the contract.

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the warm judicial regard for arbitration evident in the modern cases — a warmth that in part reflects modern caseload pressures — support a presumption that the arbitrators (who in this case, after all, were lawyers) base their award on proper grounds." 816 F.2d at 1197. The *Rumbleseat Press* Court held that *Randall* was consistent with such a presumption since it authorizes a clarifying remand *only* when the reasons given by the arbitrator strongly imply that the arbitrator may have exceeded his or her authority. *Id.* In *Anderman*, like *Rumbleseat Press*, all of the arbitrators were distinguished attorneys and included Robert Clyde Hargrove, as Tennessee's arbitrator, Robert K. Pezold, as Anderman's arbitrator, and the Honorable James P. Coleman, a former Chief Judge of the Fifth Circuit, who was appointed by the Honorable William H. Barbour, Jr., Chief Judge of the United States District Court for the Southern District of Mississippi. The findings of fact and conclusions of law made by these gentlemen, each of whom undeniably possessed the requisite experience and expertise, are not to be challenged by a reviewing court where they acted within their authority to render an award which draws its essence from the contract.

B. The Fifth Circuit's Decision to Uphold the Arbitrators' Interpretation of the Contract (and to Avoid Making its Own Interpretation) Does Not Conflict With Any Decisions of this Court or Other Courts of Appeals

A review of *Anderman/Smith*, along with the district court decision and the Arbitration Award itself, clearly reveals that the Fifth Circuit did not engage in its own interpretation of the contract in order to find some basis to uphold the award. *See* Pet. App. A, B & E at 3a-4a, 12a-17a & 21a-26a and 30a-32a, respectively. Tennessee draws upon *dicta* from this Court's decision in *Misco* to challenge the Fifth Circuit's decision as somehow having invaded the province of the arbitration panel. In reality, however, the *Anderman/Smith* Court followed precisely the directive of *Misco*, acknowledging that a reviewing court ". . . must sustain arbitration awards even if it does not agree with the arbitrators' interpretation of the contract. . . . [in view of the United States Supreme Court's command] . . . that as long as the arbitrator's decision 'draws its essence' from the contract, the award must be confirmed." *See* Pet. App. A at 5a, *citing, United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987). The Fifth Circuit made no unilateral interpretation of the contract as suggested by Tennessee; rather, the Court scrupulously adhered to the long-standing rule reiterated by this Court in *Misco* that ". . . as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Misco*, 484 U.S. at 38.

C. The Fifth Circuit's Decision Strictly Conforms With the Holdings of this Court Promoting Arbitration as a System of Efficient Dispute Resolution

Tennessee's strained mischaracterization of the *Anderman/Smith* decision is, perhaps, best illustrated in its argument that the Fifth Circuit held that efficiency, rather than scrupulous adherence to the parties' agreement, is a reviewing court's primary concern. Tennessee based this imaginative, albeit meritless, argument on the following quote from the *Anderman/Smith* decision:

> The Congressional policy of promoting arbitration requires that the courts do not intrude unnecessarily into questions that have been settled by an arbitration process agreed to by the parties, ***lest the efficiency of the arbitration process be lost***.

Pet. App. A at 5a (emphasis added in Tennessee's Petition). In its Petition, Tennessee seems to substitute the word "*unless*" for the word "*lest*" in its construction (or misconstruction) of the quoted language to concoct its spurious argument.

In essence, Tennessee attempts to alter the plain meaning of the rule, as adopted by the *Anderman/Smith* Court, which provides the admonition that a court should not intrude into the province of the arbitrators, for to do so would destroy the efficiency of the arbitration process. Tennessee seems to argue that the quoted phrase must mean that a court should not intrude unnecessarily into questions that have been settled by an arbitration process "*unless*" the efficiency of the process has been lost. To entertain this illogical notion is the only way to understand Tennessee's criticism of the Fifth Circuit. In fact, the

language quoted in the *Anderman/Smith* decision is perfectly aligned with the language quoted by Tennessee from a decision of this court indicating that the *Federal Arbitration Act* "was motivated, first and foremost, by a congressional desire to enforce agreements into which the parties had entered, and [the court should not] . . . allow the fortuitous impact of the act on efficient dispute resolution to overshadow the underlying motivation." This language quoted by Tennessee is, in every respect, nothing more than a restatement of the fundamental principles espoused by this Court and followed in *Anderman/Smith*. To argue that the *Anderman/Smith* Court rejected the line of reasoning supporting enforcement of arbitration awards is absurd in view of the court's recognition that the decision of the arbitrators was ". . . in keeping with the flexible, informal nature of arbitration" and its insistence upon protecting the integrity and finality of the arbitration procedure established by the parties. *See* Pet. App. A at 9a-10a.

III. THE FIFTH CIRCUIT'S DECISION WILL PROMOTE THE EFFICIENT AND COST-EFFECTIVE USE OF ARBITRATION BY CONTRACTING PARTIES

Tennessee argues that the *Anderman/Smith* decision will make arbitration less attractive and create a situation in which judicial review will be more costly and complex and arbitrators will not explain decisions. First, it is clear, under this Court's decisions, that arbitrators are not called upon to explain their awards. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). In *Anderman/Smith*, the Court acknowledged that arbitrators are generally not even required to disclose or explain the reasons that underlie their decision. *See* Pet. App. A

at 8a n. 3, *citing and relying on, Antwine v. Prudential-Bache Securities, Inc.*, 899 F.2d 410, 412 (5th Cir. 1990). This is consistent with the standard of review formulated in *Steelworkers* which requires the court to uphold the arbitrators' award if it draws its essence (*i.e.*, is rationally inferable) from the contract. *See* Pet. App. A at 8a n. 3.

Secondly, it is Tennessee, not Anderman/Smith, who has engaged in unnecessary filings and appeals in these proceedings to prolong the arbitral process unconscionably in an attempt to impermissibly "judicialize" the procedure. *See Amoco Oil Co. v. Oil, Chemical & Atomic Workers International Union, Local 7-1, Inc.*, 548 F.2d 1288 (7th Cir. 1977), *cert. den.*, 431 U.S. 905 (1977), *citing, Gulf States Telephone Co. v. Local 1692, International Brotherhood of Electrical Workers, AFL-CIO*, 416 F.2d 198, 201-202 (5th Cir. 1969) ("The arbiter was chosen to be the Judge. That Judge has spoken. There it ends.") The *Anderman/Smith* decision will hopefully stand as precedent to provide a warning for parties, such as Tennessee, to avoid unwarranted attacks on the intrinsic merits of arbitrators' decisions, attacks which, no matter how characterized, are without merit and which constitute frivolous and wasteful judicial challenges to conscientious and fair arbitration decisions. *See International Association of Machinists & Aerospace Workers, District 776 v. Texas Steel Co.*, 639 F.2d 279 (5th Cir. 1981). *See also United Food & Commercial Workers, Local 400 v. Marval Poultry Co., Inc.*, 876 F.2d 346 (4th Cir. 1989).

Finally, by refusing to invade the province of the arbitrators and in recognizing the extraordinarily deferential standard of review required by this Court,

the *Anderman/Smith* decision will, contrary to Tennessee's assertions, promote the use of arbitration clauses and will instill in contracting parties the assurance that arbitration will provide a flexible and informal forum for prompt and cost-effective dispute resolution. *See* Pet. App. A at 9a-10a. But for Tennessee's intentional effort to prolong these proceedings and significantly increase the cost and potential injury to Anderman/Smith caused by further delay, this matter would have ended with the unanimous decision of the arbitrators selected in strict conformity with the contract – an award which draws its essence from the contract and which precisely and directly addresses and resolves each of the issues submitted to the panel by the parties.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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